

1951

May 21

Mr. Milton G. Bulley, Commissioner  
Department of Education  
State House Annex

Dear Mr. Bulley:

At the request of the Exeter School Board you seek the opinion of this office concerning the legality of spending public tax funds to provide certain educational services to parochial school children. You have requested resolution of three specific issues:

1. The legality of voting public funds to be used to provide Fluorine treatment for children in attendance at Exeter parochial schools;
2. The legality of expending public funds to provide nurse and physical examination services to pupils attending Exeter parochial schools;
3. The legality of providing industrial arts and home economic courses in the public schools for pupils attending parochial schools.

It is my opinion that public funds appropriated at the annual Exeter School District Meeting of March 21, 1951, may not legally be used:

- (1) to provide Fluorine treatment for pupils in attendance at parochial schools;
- (2) to provide nurse and physical examination services to such pupils except as hereinafter specified; or
- (3) to provide industrial arts and home economics courses to such pupils.

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## OFFICE OF ATTORNEY GENERAL

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Public districts are generally organized for the administration, management and control of public schools - c. 1, c. 133, Revised Laws, Chapter 13, ib. . . . "to provide for health and sanitation." Section 2 of chapter 143 of the Revised Laws provides that moneys raised by the district for the support of public schools "shall be appropriated to the full support of and for the public schools within the district" for the year then commencing, "and as otherwise provided." The sole authority regarding matters relating to health services for private schools is contained in chapters 15 through 25 of chapter 143 of the Revised Laws. Section 15, ib. requires the provisions of section 15, ib. are expected to require their school boards to appoint one or more school physicians and to employ one to each public and even private school within such district, and shall provide the funds, all power or facilities for the performance of the duties as mentioned in this subdivision." Section 16, chapter 143, Revised Laws. The provisions prescribe tests and diagnosis for communicable diseases (c. 18, ib.), for defective sight or hearing, "or for other disabilities or defects tending to prevent a pupil receiving the full benefit of his school work," (c. 21, ib.) and procedural safeguards and procedures are referred to the issues presented herein. Section 25, chapter 143, Revised Laws, authorizes a district to raise money for the purposes set forth and the provisions of sections 16 through 24.

While an appropriation by a school district for fluorine treatment for pupils in attendance at public schools might legally be made under section 3 of chapter 222, supra, there is no statutory authorization for all other, and possibly of such appropriation for the purpose of providing fluorine treatments for children attending precollegial or private schools. In order to provide a legal service in the nature of fluorine treatments to precollegial or private school pupils, enabling legislation will be required.

With reference, however, to the expenditure of public funds to provide nurse and physical examination services to children in parochial schools, it is its opinion that sections 15 through 25 of chapter 142 of the Revised Laws:

- (1) not only certifies but makes mandatory in towns adopting these provisions the appointment and assignment of school physicians to both public and private schools; and
- (2) that such school physicians may utilize the services of nurses employed by them in performing their examinations at private or parochial schools, but may utilize the services of school nurses employed by the school district only at public schools.

The expenditure of public funds for providing physical examination services by school nurses and physicians in public schools is broadly authorized by section 3 of chapter 133, Revised Laws and by section 1 and 2 of chapter 140 Revised Laws.



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In order to provide nursing services or health for parochial or private schools, beyond the limits prescribed by sections 22 through 23 of chapter 136, Revised Laws, for examinations by school physicians, enabling legislation must be enacted.

With regard to your third inquiry, an examination of the statutes reveals no authorization to provide industrial arts and home economics courses at public schools for pupils in attendance at parochial schools. If part-time attendance at a public school is not expressly prohibited by regulation prescribed for attendance by the State School Board, subject to the supervision of the State Board under section 15 of chapter 136 of the Revised Laws, such special instruction to a group of pupils in full-time attendance at a private school appears to be of course unauthorized. Section 1 of chapter 237 as amended by chapter 92 of the Laws of 1949 prescribes attendance by children between certain ages and qualifications at either a public school or an approved private school "during all the time the public schools are in session." This mandatory school attendance requirement contemplates mutually exclusive attendance at a public and private school.

Authorization to conduct special courses or schools for a limited class of people with special qualifications (see ss. 17 and 18 of chapter 136, Revised Laws) or the conferring of a privilege (see s. 9, chapter 136, Revised Laws) requires statutory authorization. In the absence of such authorization it is my opinion that the school board of the Greater School District is not empowered to offer manual training and domestic science courses to parochial school pupils.

It is my conclusion that legislation will be necessary to enable public funds to be used for the extension of the desired health services to parochial schools and in order to permit parochial school pupils to attend industrial arts and home economics courses in the public schools.

You have further inquired orally as to the constitutionality of legislation authorizing the use of public funds duly appropriated by a school district for the extension of fluoro treatment and physical examination services by nurses to parochial schools, and, (2) for providing industrial arts and home economics courses at public schools for pupils attending parochial schools. While an opinion of this office is purely advisory and not authoritative in constitutional matters, it may be said that there are important constitutional issues raised by both facets of the proposed legislation. Article 63, Part Second of the New Hampshire Constitution provides: "That no money raised by taxation shall be granted or applied for the use of the schools or institutions of any religious sect or denomination." As an avowee of the police power in the interests of the health and welfare of all citizens of the state, I do not believe that the enactment of enabling legislation to extend health services to parochial school children would be inhibited by article 63, 4b. Two previous attorneys general have ruled that the enacting of a law authorizing the transportation of public persons of pupils to an area parochial school would not be unconstitutional. (See Opinion by Thomas P. Cheney, dated June 22, 1937, and Opinion by Ernest R. Parsons, dated August 23, 1946.) By section 1 of chapter 139,

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of laws of 1937, section 9, chapter 10, Revised Laws, pupils attending certain private schools, up to and including the ninth grade, became entitled to the same transportation privileges within any town or district as are provided for pupils in public schools. In Evans v. Board of Education 91 L. Ed. 7 339 U. S. 1, 130 A.L.R. 1300 the court held that a statute authorizing reimbursement to parents of money expended for transportation of their children to and from schools other than those organized for a profit, does not, in so far as it permits payment for transportation of children attending Catholic parochial schools, violate the provisions of the first Amendment of the Constitution of the United States that no law shall be made respecting the establishment of religion. The court was controlled by its construction that the purpose of the statute was merely to provide in the interest of public welfare for the safe transportation of school children irrespective of religion. The reasoning applicable to the constitutionality of a transportation statute is a fortiori applicable to the constitutionality of a statute designed to extend lunch services to pupils in parochial schools. (See Opinion of the Attorney General, August 21, 1946, upholding the validity of extending the benefits of the National School Lunch Act to children in private schools.) The provision of chapter 134-A of the Revised Laws as inserted by chapter 145 of the laws of 1947 classify school nurses or teachers for purposes of retirement benefits and not necessarily in terms of function. I do not believe such classification is persuasive in determining the constitutional question.

With regard to the constitutionality of a statute providing industrial arts and home economics courses at public schools to pupils attending parochial schools, I entertain grave doubts in view of article 83 Part II of the New Hampshire Constitution and McCollum v. Board of Education, 333 U. S. 206, 92 F.2d 649. Providing industrial arts and home economics courses for parochial school pupils with public funds is tantamount to a grant or application of such funds for the use of a parochial school.

Very truly yours,

Gordon M. Tiffany  
Attorney General

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